Official languages act (1988)

Backgrounder

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OFFICIAL LANGUAGES ACT (1988)

JEAN-CHARLES DUCHARME
LAW AND GOVERNMENT DIVISION

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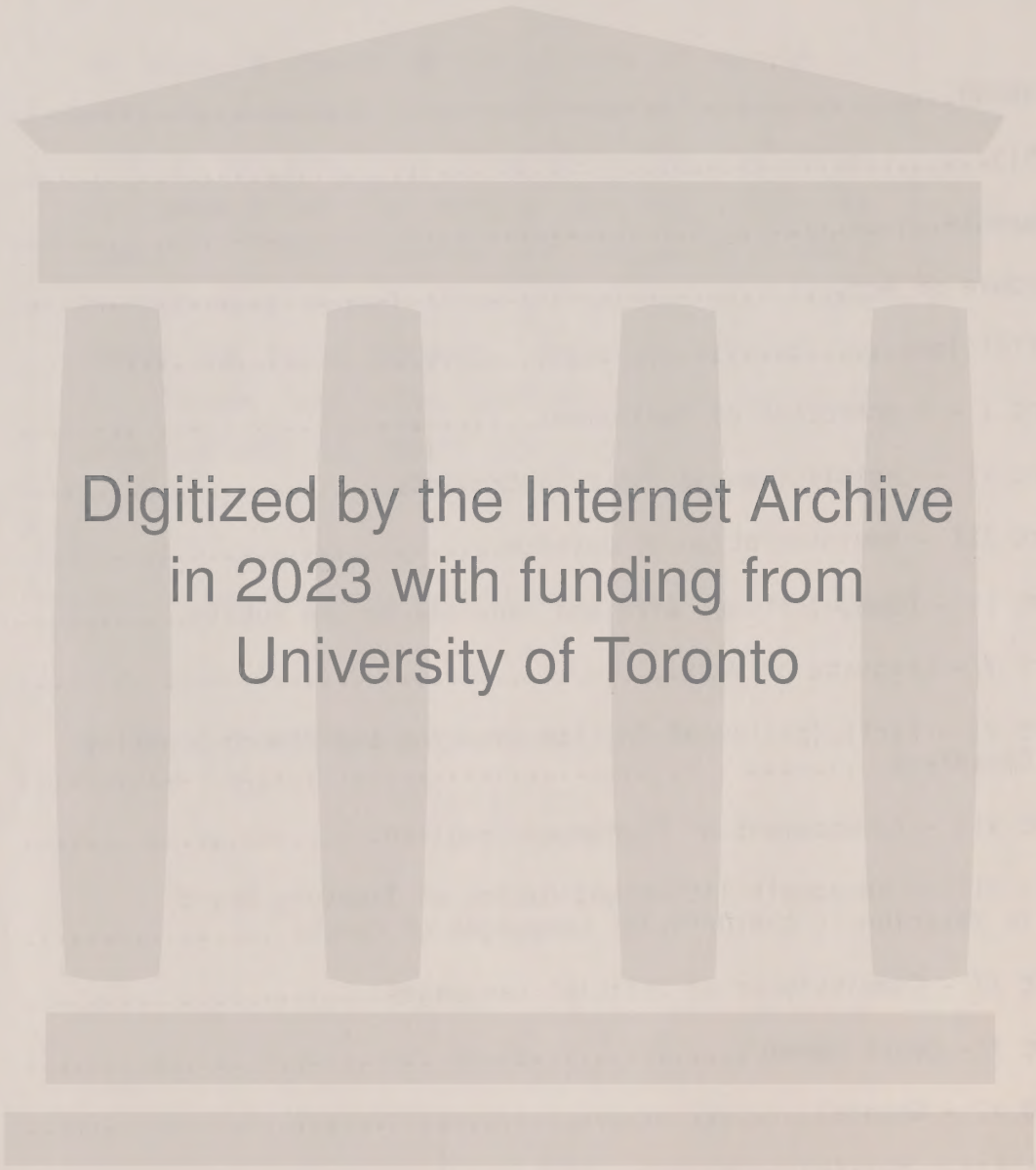

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OFFICIAL LANGUAGES ACT (1988)

BACKGROUND

Since its passage in 1969, the former Official Languages Act (R.S.C., chapter O-2) had not been amended in any way, despite numerous requests for changes from the Standing Joint Committee on Official Languages and the Commissioner of Official Languages. The requests were prompted by a weakening of the Act's scope as a result of court decisions establishing its declaratory (rather than executory) nature and its lack of primacy over other federal enactments (Association des gens de l'air du Québec Inc. v. The Honourable Otto Lang [1977] 2 F.C. 22 and [1978] 2 F.C. 371).

Furthermore, the 1982 Canadian Charter of Rights and Freedoms (hereinafter called the Charter), because of its constitutional nature and because of the opportunity it provided to citizens to seek redress, reduced the usefulness of the former Act even more. However, the linguistic rights guaranteed in the Charter (sections 16 to 22) do not apply to all aspects of bilingualism, such as language of work and equitable participation.

With the need for reform being increasingly felt, the government wanted to adapt the legislation so as to be in keeping with the Charter, to define how the latter would be enforced and to include additional rights. Given the scope of the planned amendments, the government decided to repeal the former Act and replace it with Bill C-72, also entitled the Official Languages Act (hereinafter called the Act).

The Act received Royal Assent on 28 July 1988 and was proclaimed 15 September 1988, except for clause 95 (dealing with forms in the Criminal Code), which will be in force 1 February 1989, and clause 94 (dealing with the rights of the accused under the Criminal Code in provincial courts), which will be proclaimed later.

ANALYSIS

This Act's main features are: 1) its quasi-constitutional nature; 2) its executory nature; 3) its incorporation of the parliamentary resolution of 1973; and 4) its wording, which is more explicit than that of the former Act. The contents of the present Act will now be compared with those of the Charter and the former Act.

The Act contains a preamble and 111 sections set out in 14 parts, as compared to the 39 sections of the former Act. It therefore contains several new elements: a preamble and parts governing the proceedings of Parliament (Part I), language of work (Part V), the participation of English-speaking and French-speaking Canadians (Part VI), the advancement of French and English (Part VII), the responsibilities and duties of Treasury Board in relation to the official languages of Canada (Part VIII) and court remedy (Part X). It also contains additional provisions respecting legislative and other instruments (Part II), the administration of justice (Part III) and the Commissioner of Official Languages (Part IX).

Preamble

The very presence of a preamble, rare in public law, is evidence of the importance accorded to the Act by the legislator. The Interpretation Act (R.S.C., chapter I-23, section 12) stipulates that a preamble of an enactment shall be read as a part thereof intended to assist in explaining its purport and object. Thus, a preamble is an interpretation provision.

The preamble specifically mentions sections 16 to 20 of the Charter, language of work, equitable participation and the commitment on

the part of the federal government to advancing bilingualism, official language minority communities and cooperation with provincial governments. It is interesting to note that the Act assigns responsibility to the federal government for the advancement of official languages, whereas the 1987 Constitutional Accord (the Meech Lake Accord) assigns the task of safeguarding the language to both the federal government and the provinces, with Quebec given the added responsibility of promoting its own distinct character.

Purpose of Act

The Act has a threefold purpose: 1) to ensure the equal status of the two official languages; 2) to support the development of official language minority communities and progress towards equality of status for the two official languages; and 3) to set out the powers, duties and functions of federal institutions in this area.

The statement of purpose relating to the equal status of the two official languages encompasses the rights governed by sections 16 to 20 of the Charter. It does not mention language of work and equitable participation, which are two of the three basic components of the federal government's bilingualism policy, the third being language of service.

Definitions

To make up for the former Act's lack of clarity, section 3 of the Act is more explicit. Thus, section 3(1) includes in the definition of "federal institution" the House of Commons, the Senate, federal courts, government bodies or offices, departments and Crown corporations. This particular wording puts an end to the debate about the application of the Act to Parliament. In addition, the Crown corporation designation is extended to wholly-owned subsidiaries. Finally, the government of the Northwest Territories, of the Yukon Territories and of any body established to perform a governmental function in relation to an Indian band or other group of aboriginal people are not included in the list of federal institutions.

Part I - Proceedings of Parliament

Section 4 of the Act is not to be found in the former Act. However, section 4(1) restates section 17(1) of the Charter, which stipulates that everyone has the right to use English or French in any debates or proceedings of Parliament. Section 4(2) provides for the additional right to simultaneous interpretation of the debates and other proceedings of Parliament. Previously, this was neither a constitutional nor a statutory right, though simultaneous interpretation had been provided following an order of the House of Commons (1958) and the adoption of a Senate report (1960).

Part II - Legislative and Other Instruments

This part, which stipulates that legislative instruments must be made, printed, published and tabled in both official languages, restates and rounds out the provisions governing this area in the former Act.

Sections 5 and 6 reproduce the wording of section 18(1) of the Charter, which refers to the statutes, records and journals of Parliament. Notices, advertisements and other matters published by federal institutions for the information of members of the public (section 11) and rules and so forth governing practice and procedure (section 9) are still covered, but exceptions are no longer allowed in the event of an emergency. Lastly, the Act henceforth also applies to international treaties and federal-provincial agreements (section 10).

The only exceptions mentioned have to do with exclusions from the definition of "federal institutions." Ordinances of the Northwest Territories, of the Yukon Territory and by-laws or other instruments of a body established to perform a government function in relation to an Indian band or other group of aboriginal people (section 7(3)) are excluded.

Part III - Administration of Justice

The wording of section 14 of the Act is similar to that of section 19(1) of the Charter, as regards the right of everyone to use the

official language of his choice before the courts established by an Act of Parliament. Much like the former legislation, the courts ensure that a witness is not placed at a disadvantage by using the official language of his choice (section 15(1)) and that facilities for simultaneous interpretation are made available at the request of any party to the proceedings or where the proceedings are considered to be of general public interest or importance (sections 15(2) and (3)). Unlike the former Act, this right is not restricted to the National Capital Region or to federal bilingual districts and is no longer a discretionary provision.

In addition, under section 16(1) of the Act, courts, with the exception of the Supreme Court of Canada, are required to ensure that a judge is able to understand the official language in which the proceedings are being conducted, without the assistance of an interpreter. This provision prevents a recurrence of situations such as arose from the decision in Société des Acadiens du Nouveau-Brunswick ([1986] 1 S.C.R. 549), where the court ruled that the right of the parties to use one official language did not impose on the presiding officer the responsibility or obligation to understand that official language. The Federal Court and the Tax Court of Canada are required to comply with this provision immediately, while other courts will have five years to comply (section 16(2)). This duty imposed on federal courts is institutional, not individual; that is, federal courts have to have a bilingual capacity at the judge level, but not all judges have to be bilingual.

Finally, the Act contains two new provisions: 1) the obligation on the Crown or a federal institution, when a party to civil proceedings, to use the official language chosen by the other parties, except when reasonable notice has not been given (section 18); and 2) the requirement that legal documents served by federal institutions must be set out in both official languages (section 19(1)).

Part IV - Communications with and Services to the Public

This part of the Act combines section 20(1) of the Charter and the provisions of the former Act governing the application of language of service. Thus, unlike the Charter, the Act identifies the National

Capital Region as a target area, as well as the head or central offices of federal institutions. With respect to the criteria governing the provision of services, the nature of the office, a feature not mentioned in the former Act, is also a factor, in addition to the significant demand criterion. The new Act, unlike the former legislation, specifies that this criterion applies not only in Canada but also abroad. Furthermore, the Act abandons the concept of federal bilingual districts.

With respect to the travelling public, section 23 has the same scope as the provisions of the former Act, in that it applies to services extended in Canada and abroad, including those made available by another party pursuant to a contract with the federal institution. However, exemptions no longer apply if the demand is "too low or uneven." Rather, for the provision of services it must be established that the demand is "significant." This change came about in order to conform to the wording of section 20(1) of the Charter and to avoid multiplying the application concepts in the Act.

The concept of significant demand is covered by section 32, which gives the Governor in Council the power to make regulations in light of the criteria set out in section 32(2). No legislative definition of "significant demand" is therefore given. The concept of active offer is recognized in the Act (section 28). Provisions pertaining to language of service take precedence over incompatible provisions pertaining to language of work (section 31).

Part V - Language of Work

This part would strengthen the provisions of the 1973 parliamentary resolution by incorporating them into the Act and by defining their scope of application. It therefore has no equivalent in either the Charter or the former Act. Furthermore, the Governor in Council is given the power to make regulations to ensure the application of section 38.

Section 34 stipulates that English and French are the languages of work of all federal institutions and that officers and employees of such institutions have the right to use either official language. Section 35 provides that this right extends: 1) to federal

institutions located in the National Capital Region; and 2) to federal institutions located in any region or part of Canada set out in an annex of the Treasury Board (New Brunswick, certain regions of Quebec and Ontario) and 3) to any place outside Canada prescribed by regulation. Section 38(2) provides that certain bilingual regions or sectors in Canada may be added or deleted from the annex of the Treasury Board. This is reminiscent of the concept of federal bilingual districts in the former Act.

Consequential obligations to the right to "work environments that are conducive to the effective use of both official languages" include: 1) the provision of services and work instruments; 2) the use of bilingual data processing and communications systems (after 1 January 1991); and 3) the ability of supervisory and management personnel to communicate and carry out their functions in both official languages (section 36(1)).

Part VI - Participation of English-Speaking and French-Speaking Canadians

This part, which also embodies the 1973 parliamentary resolution and is absent from the Charter and the former Act, commits the federal government to ensuring that there is equal access to appointment and advancement and that the composition of the work-force in federal institutions will "reflect the presence of both the official language communities," taking into account the characteristics of these institutions, their mandates, the public they serve and their locations (section 39(1)).

Employment opportunities are therefore open to all Canadians, given the concepts of language of service and language of work (section 39(2)). However, nothing abrogates or derogates from the principle of selection of personnel according to merit (section 39(3)). The Governor in Council is granted the power to make regulations to ensure the application of this part (section 40).

Part VII - Advancement of French and English

Pursuant to section 41 of the Act, the federal government is committed to enhancing the vitality of minority communities, supporting and assisting their development and fostering the full recognition and use of both official languages. This provision is not contained in either the Charter or the former Act. However, as has already been mentioned, the federal government is assigned the role of promoting Canada's linguistic duality, incorporating in legislation the provision of the 1987 Constitutional Accord regarding the preservation of this duality.

The Secretary of State of Canada is responsible for ensuring a coordinated approach to the implementation of this provision (section 42), using the measures set out in section 43, especially the encouragement and assistance to provincial governments and the private sector. Federal ministers are able to consult and negotiate with provincial governments to ensure the coordination of federal, provincial, municipal and educational services in both official languages (section 45).

Part VIII - Responsibilities and Duties of Treasury Board in Relation to the Official Languages of Canada

Unlike the former Act, which did not designate any one authority as responsible for its implementation, the Act entrusts to Treasury Board the responsibility for the general direction and coordination of federal programs relating to language of service, language of work and equitable participation within federal institutions other than the Senate, House of Commons and Library of Parliament (section 46(2)). Treasury Board is required to submit to Parliament an annual report on the status of programs carried out by the institutions in respect of which it has responsibility (section 48); this ensures better monitoring of activities related to official languages.

Part IX - Commissioner of Official Languages

The Act confirms the mandate and powers of the Commissioner of Official Languages, with some additions. The duty of the Commissioner,

to ensure compliance with the spirit and intent of the Act, now includes the overseeing of the advancement of both official languages in Canadian society (section 56(1)). This added duty is consequential on the commitment to promote official languages made by the federal government in Part VII of the Act.

The Commissioner is required to carry out the following additional duties: 1) review any regulations or directives that may affect the status or use of the official languages and comment on the review in a report (section 57); 2) request that deputy heads or other administrative heads of federal institutions that have been investigated notify him, within a specified period of time, of the measures they intend to take to follow up on his recommendations (section 63(3)); 3) report to the President of the Treasury Board that a plaintiff is subject to threats, intimidation or discrimination (section 62(2)); 4) submit to Parliament a special report on any matter within the scope of his powers where the matter is of such urgency or importance that a report cannot be deferred until the time of the next annual report (section 67(1)); and 5) disclose the information necessary to carry out an investigation (section 73). Any report on an investigation into the activities of a federal institution is no longer submitted to the Clerk of the Privy Council, but rather to the President of the Treasury Board (section 63(1)), in light of his responsibilities.

In addition, the Commissioner (or any person acting on his behalf): 1) is not compelled to give evidence in respect of any matter coming to his attention as a result of performing his duties (section 74); 2) enjoys immunity from criminal or civil proceedings against him for anything done in good faith in the performance of his duties (section 75(1)); and 3) enjoys immunity from prosecution for libel or slander relating to anything done in good faith in the performance of his duties (section 75(2)).

Part X - Court Remedy

This part is extremely important since it corrects one of the shortcomings of the former Act, namely its declaratory nature, by

conferring an executory nature on the new Act. Thus, any person can apply to the Federal Court for a remedy (section 76) after having made a complaint to the Commissioner with regard to: 1) the proceedings of Parliament; 2) legislative instruments (except for procedural texts); 3) language of service and language of work (section 77(1)); or 4) staffing. The executory nature of the Act is compatible with that of the Charter (set out in section 24(1)) and allows a person to seek remedy from a court (section 77(4)). The Commissioner also has the power to grant such remedy himself or to appear before the Court on behalf of the person (section 78). Finally, section 79 provides the possibility of grouping together similar complaints relating to the same federal institution.

Part XI - General

This part is also important in that it corrects another shortcoming in the former Act, namely the fact that it did not enjoy primacy over other federal enactments. By clearly stipulating that Parts I to V have primacy over federal laws (section 82(1)) other than the Canadian Human Rights Act (section 82(2)), the Act takes on a quasi-constitutional nature, which makes it more compatible with the Charter.

Not all parts of the Act have primacy over federal enactments, only to those parts setting out the essential elements of language rights, excluding the concept of equitable participation. The provisions of the Act are not subject to a "notwithstanding" clause.

Pursuant to Part XI, the President of the Treasury Board has the power to consult with minority official language communities and with the general public on proposed regulations to be made under the Act (section 84). Furthermore, the administration of the Act is reviewed by a parliamentary committee (section 88).

Lastly, regulation provided under this Act is subject to a particular proceeding. The draft of a proposed regulation must be tabled 30 sitting days before its publication in the Canada Gazette (section 85) and a proposed regulation must be published in the Canada Gazette 30 sitting days before it comes into force, allowing interested persons the opportunity to make representations to the President of Treasury Board

(section 86). Regulations related to the designation of bilingual regions or sectors in Canada must be tabled 30 sitting days before the proposed effective date. Each house must vote on any motion to disapprove that has been signed by a certain number of members or senators (section 87).

Part XII - Related Amendments

The purpose of this part is to amend certain provisions in other enactments, including the Criminal Code. Part XIV.1 of the Code entitled "Language of the Accused" already recognizes that an accused person has the right to plead his case before a justice who speaks his language. The Act extends this right to the counsel and witnesses, at the time of the preliminary inquiry and during the proceedings. It also sets out new rights with regard to simultaneous interpretation, a bilingual transcript, a public trial in the language of the accused and the availability of any written judgment in the language of the accused (section 94(1)).

Pursuant to section 94(2), these provisions came into force on the day the Act was assented to in the case of the provinces already enforcing Part XIV.1 of the Criminal Code or on the day of its proclamation for the other provinces (Newfoundland, Alberta and British Columbia). Pursuant to section 96, Part XIV.1 of the Criminal Code (except section 462.11 for the three provinces mentioned above) will apply throughout Canada as of 1 January 1990 at the latest for offences punishable on summary conviction and criminal offences.

This part entrenches the official language ordinances of the Northwest Territories and Yukon in their establishing Acts (sections 97 and 98).

Part XIII - Consequential Amendments

This part makes some technical adjustments to certain statutes. The Canadian Arsenals Limited Divestiture Authorization Act and the Northern Transportation Company Limited Disposal Authorization Act are amended to bring these corporations in line with the Act, in keeping with the broader definition of a Crown corporation.

Part XIV - Transitional Provisions, Repeal and Coming into Force

Until section 96 extends the application of Part XIV.1 of the Criminal Code (except section 462.11) to all provinces, as of 1 January 1990, sections 105 and 106 establish a transitional régime for the three provinces (Newfoundland, Alberta and British Columbia) in which that Part does not now have effect (section 107).

Much like the previous legislation, every court in Canada exercising jurisdiction in federal criminal matters now ensures that any person giving evidence before it will not be at a disadvantage in using the official language of his choice (section 105(1)) and may allow the proceedings be conducted and the evidence be given and taken in the official language of the accused, if it can be effectively done (section 105(2)). This last possibility applies to provincial courts only if proceedings in civil causes or matters can be conducted in both official languages (section 105(3)).

Lastly, pursuant to section 106, a transitional system is set up in those provinces in which Part XIV.1 of the Criminal Code is not in force. An accused may be heard in the official language of his choice and is entitled to simultaneous interpretation services. Furthermore, witnesses are able to give evidence in the official language of their choice.